Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1997

RHONDA WISLAND,

*Petitioner,*

*vs.*

ADMIRAL BEVERAGE CORP. and
PAUL JAMES MAYER, IV,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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58 pp.

## QUESTIONS PRESENTED

Under 28 U.S.C. § 1391 involving venue, are the injuries and damages of a plaintiff such a substantial part of the events giving rise to the claim as to allow venue in the district where the damages arose, rather than in the district where the collision occurred?

Did the district court in South Dakota refuse to follow United States Supreme Court directives by allowing defendants to amend their answer one and one-half years after the case started despite the court's finding of "no excusable neglect", without a showing of good cause, and without following the two-step procedure of first determining whether a scheduling order should be amended under Rule 16 before attempting to exercise discretion under Rule 15 of the Federal Rules of Civil Procedure?

## PARTIES TO THE PROCEEDING

There are no parties to the proceeding, other than those listed on the cover page. There are no parent or subsidiary companies to be listed.

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Petitioner, Rhonda Wisland, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in *Wisland v. Admiral Beverage,* 119 F.2d 733 (8th Cir. 1997) (App. A, 1a-10a). The rehearing was denied September 10, 1997, by the Eighth Circuit (App. G, 32a). The opinion of the District Court for the United States District Court for the District of South Dakota — Southern Division is Civil Case No. 94-4219; is not published (App. C, 13a-22a).

## STATEMENT OF JURISDICTION

The denial of the petition for rehearing was denied September 10, 1997 (App. G, 32a). The decision of the Eighth Circuit Court of Appeals was filed July 16, 1997 (App. A, 1a-10a). 119 F.2d 733 (8th Cir. 1997).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 13 of the Rules of the Supreme Court.

## STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. § 1391(a) provides:

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action

> is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1404 provides:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.
>
> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

28 U.S.C. § 1406 provides:

> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
>
> (b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

Federal Rule of Civil Procedure 6(b) provides:

> **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

Federal Rule of Civil Procedure 15(a) provides:

> **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Federal Rule of Civil Procedure 16(b) states in part:

> A schedule shall not be modified except upon a showing of good cause and by leave of the district judge . . .

Federal Rule of Civil Procedure 16(e) provides:

> **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

## STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was diversity of citizenship and amount in controversy, which is not disputed. The dispute in this case involves "venue" rather than jurisdiction.

Petitioner Rhonda Wisland was a resident of Wisconsin returning from a motorcycle rally in South Dakota; and was injured in a collision in South Dakota August 5, 1991. She suffered severe injuries including fractures which required operations and was treated for her injuries in Wisconsin where she resided. The two respondents in this case are residents of South Dakota and Wyoming, respectively. On August 4, 1994, Wisland filed her summons and complaint in the United States District Court for the Western District of Wisconsin; and the case was subsequently transferred by stipulation to the federal district court in South Dakota, Southern Division, where it remained. The district court in South Dakota ultimately allowed

defendants to amend their answer and move for summary judgment upon the basis that the statute of limitations was not tolled by the filing of the case in the Western District of Wisconsin.

The case was filed in the federal court of Wisconsin under 28 U.S.C. § 1391, which basically states that an action may be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred". Since petitioner's operations and most of her injuries and damages arose in Wisconsin; since the petitioner resides in Wisconsin, the petitioner filed in federal court in Wisconsin. The case was transferred by voluntary stipulation of all parties (without stating a reason for the transfer) to federal court in South Dakota. Her damages in Wisconsin are not disputed and she underwent extensive treatment for serious injuries resulting in pain and suffering, loss of earning capacity, medical, hospital and other care and expense as a result of multiple injuries, including compression fracture of her spine, a fractured coccyx and a fractured left foot.

There is no dispute that Wisconsin, like federal law, has a "file first, serve later" statute of limitations whereby filing the summons and complaint tolls the statute of limitations; and in Wisconsin, the petitioner then has 60 days to accomplish service upon the respondents. South Dakota, on the other hand, tolls the statute of limitations by serving the defendant first, and then filing the action. In Wisland's case, it is undisputed that the two states had identical three year statute of limitations; and that Wisland filed in federal court in Wisconsin within the three year period, but the respondents were actually served with the summons and complaint within 60 days but after the three year statute of limitations would have run.

Respondents, by Wisconsin counsel, filed motions to

dismiss because of the lack of personal jurisdiction and venue in the district court for the Western District of Wisconsin. The district court served all counsel with a briefing schedule that set September 5, 1994, as the time for respondents to file their brief in support of any motions they wished to pursue. No such brief was ever filed, nor were those motions pursued.

Subsequently, a stipulation to transfer the case to the United States District Court for the Southern District of South Dakota was entered into by counsel for the respective parties; and the order for transfer was signed on September 29, 1994.

The case proceeded as a normal personal injury case in the district court of South Dakota; and discovery and trial preparation continued for about one and one-half years, until March 23, 1996, when counsel for respondents filed a motion for leave to amend their answer to include a "statute of limitations" defense. Ultimately, that motion was granted. On September 23, 1996, the district court in South Dakota heard respondents' motion for summary judgment based upon a statute of limitations defense; and granted such motion. Wisland moved for reconsideration in order to point out the court's error of law and to bring before the court additional facts; but the court refused to reconsider its decision. Petitioner Wisland then appealed.

The federal court in South Dakota determined that if venue was proper in the federal district court in Wisconsin, the law of the transferor court (Wisconsin) would apply and the statute of limitations would have been tolled. However, the court determined that the federal court of Wisconsin did not have venue; and therefore, the South Dakota statute of limitations requiring delivery to the Constable applied, and that divesting possession by First Class mail addressed to the Constable did not constitute "delivery".

Basically the district court in South Dakota ultimately determined that if the transfer was voluntary under 28 U.S.C. § 1404 the law of the transferror court applied as to tolling the statute of limitations; and under Wisconsin law (file first, serve second), the statute of limitations was tolled and he could not dismiss the case. However, the district court went on to assume that he felt the transfer must have been under § 1406 as an involuntary transfer, because he felt that the Wisconsin court did not have venue and that therefore the South Dakota law would apply (delivered to the Constable first to toll the statute, then serve and file).

## REASONS FOR GRANTING THE WRIT

### I.

### THE SUPREME COURT SHOULD DETERMINE WHETHER OR NOT INJURIES AND DAMAGES ARE A SUBSTANTIAL PART OF A CAUSE OF ACTION GIVING RISE TO VENUE IN THE JURISDICTION WHERE THEY OCCURRED.

The underlying issue here is whether or not the injuries and damages of a petitioner constitute a substantial part of the events giving rise to the claim. If in fact they do, then Wisland was proper in filing in Wisconsin where she resided and where her injuries and damages occurred. If not, then the court felt she should have initially served and filed in South Dakota where the collision occurred.

Every personal injury case involves two elements, liability and damages. Without both elements, there is no case. If a defendant is negligent but causes no damage, there is no cause of action. Likewise, if a plaintiff is severely damaged and it is not the result of defendant's negligence, there is no cause of

action. It takes both negligence and damages to create a cause of action for personal injuries. In this case, the negligence occurred in South Dakota, but the damages rose in Wisconsin. Therefore, even if respondents had not waived any right to raise these issues, the petitioner could have still venued her action in Wisconsin.

The Eighth Circuit has already put these arguments to rest in the case of *Dahlberg v. Harris*, 916 F.2d 443 (8th Cir. 1990). *Dahlberg* filed a medical malpractice action in the United States District Court for the Western District of Wisconsin alleging negligence by a doctor and the medical center in Minnesota. ("liability" Minnesota, "damages" Wisconsin.) By agreement of the parties, the case was transferred from the Western District of Wisconsin to the district court in Minnesota; after which respondents moved for summary judgment on the ground that the statute of limitations barred Dahlberg's action. In *Dahlberg*, the circuit held that the law to be applied was Wisconsin (p. 444) especially because the action was deemed to have been transferred under 28 U.S.C. § 1404(a). Again, in the *Dahlberg* case, Wisconsin had a "file first, serve later" statute and Minnesota had a "serve first, file later" statute. The *Dahlberg* case also discusses interest of justice, fairness, whether or not a plaintiff should guess what jurisdictional law for service might apply, and other factors. *Dahlberg* also points out that the Seventh Circuit, which includes Wisconsin, has held that the Wisconsin Supreme Court consistently construes state statutes so as to avoid barring plaintiff's claims because to do otherwise would be to conflict with the "remedy for wrongs" provision of the Wisconsin Constitution. *Id.*, p. 447. The *Dahlberg* case also points out that if an accident happened outside Wisconsin, Wisconsin will apply the foreign period of limitation; but that does not mean that the foreign jurisdictions method of service nor "commencement provision" will apply. *Id.*, p. 448. The Eighth Circuit went on to provide that with the option of statute

of limitations does not mean that Wisconsin would be required to adopt the "commencement provision" of the jurisdiction whose statute of limitations applies. The Wisconsin commencement provision applies even when another state's statute of limitations is borrowed under Wisconsin Law.

Where jurisdiction of the case is founded only on diversity of citizenship, the action may be brought in the district where the plaintiff resides or where some portion of the claim arose. 28 U.S.C. § 1391(a); *see also Commercial Lighting Products, Inc. v. United States District Court*, 537 F.2d 1078 (9th Cir. 1976).

The federal district judge in South Dakota made an assumption that the stipulation transferring the case from Wisconsin to South Dakota must have been under 28 U.S.C. § 1406 rather than 28 U.S.C. § 1404 and that, therefore, he felt the Wisconsin tolling statute could not apply. The case of *Ferens v. John Deere Company*, 110 S. Ct. 1274 (1990), involved a conflict of law situation. That was a case filed in Mississippi against the manufacturer of a combine; the case was transferred to Pennsylvania; the manufacturer moved for summary judgment which was granted by the trial court and affirmed by the court of appeals; but reversed by the Supreme Court, which held that the transferee forum was required to apply the law of the transferror court regardless of which party initiated the transfer. The *Ferens* Court, discussing other cases, upheld the fact that permitting a transfer for the convenience of parties and witnesses or in the interest of justice does not deprive the litigants of the state law advantages of the transferor court and that the transferee court must follow the choice-of-law rules prevailing in the transferor court. Interestingly, the *Ferens* decision, at page 1277, states that Ferens originally sued in Pennsylvania when Ferens was a resident of Pennsylvania and John Deere was

incorporated in Delaware even though the tort statute of limitations had run; and the *Ferens* Court said:

> The district court had diversity jurisdiction, as Ferens and his wife are Pennsylvania residents, and Deere is incorporated in Delaware with its principal place of business in Illinois.

The Ferens then filed a second diversity suit in Mississippi alleging negligence and products liability. Deere also had a corporate office in Mississippi. Ferens' hope was that Mississippi courts would apply the six year statute of limitations for injuries. Ferens moved to transfer the case from Mississippi to Pennsylvania on the grounds that a substantial number of witnesses resided in Pennsylvania, documentary evidence was in Pennsylvania, plaintiffs resided in Pennsylvania, action was already pending in Pennsylvania. That transfer was made under 28 U.S.C. § 1404(a).

A prime example of a situation in which the "act" occurred in one jurisdiction and the "damages" occurred in another jurisdiction is found in the case of *Winnebago Tribe of Nebraska v. Bruce Babbitt, Secretary of the Department of Interior*, 915 F. Supp. 157 (D.S.D. 1996). In that case, both the U.S. House of Representatives and the U.S. Senate in Washington, D.C., passed a law that resulted in a hiring freeze which would affect the Tribe. Prior law required a discussion with tribal authorities prior to such action. The tribes affected would be in Nebraska; and the meeting was normally held in South Dakota. The defendant, the Secretary of Interior in Washington, D.C., contested the venue in the District Court of South Dakota since the defendant resides in Washington, D.C. Only the "damage" and "failure to meet" occurred in Nebraska and South Dakota. The court construed a similar section of 28 U.S.C. § 1391 stating that venue could be brought where a substantial part of the events or omissions giving the rise to the claim occurred. This language

is exactly the same as in the instant *Wisland* case. The South Dakota Court determined that the "damages" (omission to consult) occurred in South Dakota and, therefore, a substantial part of the events or omissions giving rise to the claim were sufficient to grant jurisdiction in South Dakota. The *Winnebago Tribe* court felt that the amended venue statutes were intended to expand the number of venues available to a plaintiff, citing, *Woodke v. Dahm*, 70 F.3d 983 (8th Cir. 1995). The *Winnebago Tribe* court also said the question to ask is whether or not the plaintiff chose a district which had a substantial connection to the claim, not whether or not other forums had greater contacts, citing, *Setco Enterprises v. Robbins*, 19 F.3d 1278 (8th Cir. 1994).

In the case of *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 82 S. Ct. 913 (1962), the Court basically said that when a lawsuit is filed, such filing shows a desire on the part of the plaintiff to begin the case and toll whatever statute of limitations would otherwise apply; that the filing itself shows proper diligence on the part of the plaintiff which the statutes of limitations were intended to ensure; and that if by reason of uncertainties of improper venue a mistake is made Congress recognized under 28 U.S.C. § 1406(a) that the interest of justice may require that the case not be dismissed but transferred to another venue. On summary judgment, the *Goldlawr* philosophy should prevail because it is the most favorable to the party moved against.

The Court should grant this petition to determine for litigants whether or not the injuries and damages are a substantial part of a cause of action giving rise to venue in the jurisdiction where they occurred. If a personal injury lawsuit requires two elements: negligence and damages; then damages are certainly a substantial element of the cause of action. If those damages arose for Wisland in the Western District of Wisconsin, venue there was proper and so was the manner of service.

## II.

## THE DISTRICT COURT WAS ALLOWED TO IMPROPERLY ALLOW AN AMENDMENT OF PLEADINGS WITHOUT FIRST CONSIDERING AN AMENDMENT OF THE RULE 16 SCHEDULING ORDER AND DESPITE A SPECIFIC FINDING BY THE JUDGE OF "NO EXCUSABLE NEGLECT" ON THE PART OF DEFENSE COUNSEL.

FRCP 6 requires a finding for enlargement of time where the failure to act "was a result of excusable neglect". FRCP 6(b). The court expressly made a factual finding that there was "no excusable neglect".

The Court must take a two-step procedure involving both Rule 16 and Rule 15. In *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992), the court discussed attempts to amend pleadings after a scheduling order has issued and the interrelationship of Rule 15 and Rule 16. The court of appeals correctly stated that once the district court had filed a pretrial scheduling order pursuant to Rule 16, which establishes a timetable for amending pleadings, the standards of that rule control as to the right to extend that time and, therefore, amend pleadings. A party's ability to amend his pleading is governed by Rule 16(b), not Rule 15(a). The significance is that Rule 16(b) requires a showing and finding of good cause by the judge.

The original scheduling order in this case was dated February 3, 1995, and set August 1, 1995, to move to amend pleadings. An amended Rule 16 scheduling order was signed by the court on October 3, 1995, but allowed no additional time to amend pleadings. That amended scheduling order did provide in paragraph 5 that "the date set out herein may be modified by the court for good cause shown". However, no good cause was

ever shown and the court specifically made a finding to the contrary. Nevertheless, it was on or about March 26, 1996, when respondents filed their motion for leave to amend answer; but no motion to amend the scheduling order.

Respondents did not comply with any Rule 16 scheduling orders by timely amendment of pleadings and/or raising the appropriate issues.

In the instant case, the district court did not follow law in failing to follow this two stage process.

> A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

*N.A.A.C.P. — Special Contribution Fund v. Atkins*, 908 F.2d 336, 339 (8th Cir. 1990), citing *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990).

The district court in South Dakota totally ignored the law by ignoring Rule 16, and instead allowing the amendment of pleadings despite its specific finding of lack of good cause. This is a mistake of law ignored by the Eighth Circuit Court of Appeals which seemed to have totally sidestepped the question of Rule 16. If a court can allow amendment of pleadings contrary to the express requirements of Rule 16, what is the reason for having Rule 16?

## CONCLUSION

Both of the issues in this case are significant and the Court should grant certiorari to resolve them. The question which should be put to rest by this Court, especially, is the question of whether or not damages arising in the state of the residence of an injured party can give rise to venue in that jurisdiction.

Respectfully submitted,

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## APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 16, 1997

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-3916

Rhonda R. Wisland,

Appellant,

v.

Admiral Beverage Corporation; Paul James Mayer IV,

Appellees.

Appeal from the United States District Court
for the District of South Dakota.

Submitted: June 11, 1997
Filed: July 16, 1997

Before MURPHY, HEANEY, and JOHN R. GIBSON, Circuit Judges.

MURPHY, Circuit Judge.

This action arises out of an automobile accident in which Rhonda Wisland sustained a personal injury. The district court[1]

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1. The Honorable John B. Jones, United States District Judge for the District of South Dakota.

granted summary judgment for Admiral Beverage Corporation and Paul Mayer (collectively referred to as Admiral) because it concluded that the South Dakota statute of limitations had run on Wisland's tort claim because of untimely service. Wisland argues on appeal that Wisconsin law should have been applied, that the district court erred by allowing Admiral to amend its answer to include the statute of limitations as an affirmative defense, and that her process was timely served. We affirm.

On August 5, 1991 Wisland was driving her motorcycle through South Dakota when several boxes of drinking straws fell from a truck in front of her. She lost control of her motorcycle when it rolled over the straws and was injured in the resulting accident. The truck was owned by Admiral Beverage, and the driver was its employee Paul Mayer. Wisland is a Wisconsin resident and returned to that state after the accident where she was treated for her injuries. Mayer is a South Dakota resident, and Admiral Beverage is incorporated in Wyoming but does business in South Dakota.

Wisland originally filed her complaint in the United States District Court for the Western District of Wisconsin on August 4, 1994 and mailed copies of the summons and complaint to constables in Pennington County, South Dakota on August 5. The copies were received by the addressees on August 9, and Admiral Beverage and Mayer were served on August 10.

In their initial answer, defendants moved to dismiss Wisland's complaint on the grounds that the Wisconsin district court lacked personal jurisdiction and was not the proper venue. Defendants' motions were never addressed by that court, however, because it transferred the case to the District of South Dakota on September 29, 1994, pursuant to a stipulation of the

parties. Neither the Wisconsin district court nor the stipulation specified the statutory basis for the transfer, but the stipulation provided that the parties "do not waive any defenses or claims which may be asserted in the United States District Court for the District of South Dakota."

Once in South Dakota, the case began to move toward trial. In February 1995 Judge Jones entered a Rule 16 scheduling order establishing August 1, 1995 as the deadline for amendments to the pleadings and January 1996 as the deadline for discovery and any additional motions. Judge Jones twice amended this order by extending the deadlines for discovery and for certain motions to March 1996.

Admiral filed a motion for summary judgment on March 24,1996, claiming that Wisland had failed to commence her action before the South Dakota statute of limitations had run, as well as a motion to amend its answer to include the South Dakota statute of limitations as an affirmative defense. In June 1996 the district court granted the motion to amend, and in September 1996 it granted summary judgment for Admiral and Mayer.

A decision to grant summary judgment is reviewed de novo. *Michalski v. Bank of Am. Ariz.*, 66 F.3d 993, 995 (8th Cir. 1995). The relevant facts here are undisputed, but the parties differ over the legal issues, including whether Wisland commenced her action within the applicable statute of limitations.

In a diversity case state law determines when an action is commenced for the purpose of applying the statute of limitations. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980). Both Wisconsin and South Dakota have a three year statute for

personal injury actions, *see* S.D. Codified Laws § 15-2-14(3) (Michie 1984); Wis. Stat. Ann. § 893.54 (West 1996), but the procedures for starting an action differ. Under South Dakota law an action is commenced when the summons is served on the defendants, and service on the defendants within the statutory period prevents the limitations period from barring an action. S.D. Codified Laws § 15-2-30. It is also sufficient, however, if the summons is delivered within the limitations period to the sheriff or other officer of the relevant county so long as service is affected by publication or actual delivery to the defendants within sixty days. S.D. Codified Laws § 15-2-31. In Wisconsin an action is commenced by filing a summons and complaint with the court; the plaintiff then has sixty days to serve the defendants. Wis. Ann. Stat. § 801.02.

Because of the different procedures used to initiate an action, the running of the statute of limitations period depends on whether Wisconsin or South Dakota law applies. Under either state law the three year limitations period started August 5, 1991, the day of the accident. Wisland filed in Wisconsin on August 4, 1994, which was in that state's limitations period since filing commenced the action and all parties were served within sixty days. Under South Dakota law the action is not commenced until service is had, and Wisland did not deliver her summons and complaint to the South Dakota process servers until August 9 and the defendants were not served until August 10, 1994.

When a diversity case is transferred from one federal court to another, the choice of law depends on the nature of the transfer. Transfer is allowed under 28 U.S.C. § 1404(a)[2] for the

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2. 28 U.S.C. § 1404(a) reads:

For the convenience of the parties and witnesses, in the

(Cont'd)

convenience of the parties and witnesses, and the chance for unfair prejudice or forum shopping is minimized because the district court is required to consider the interests of all involved in deciding whether to allow a transfer. With a § 1404(a) transfer the law of the transferor court applies, which in this case is the law of Wisconsin. *See Ferens v. John Deere Co.*, 494 U.S. 516, 531 (1990). Transfer is permitted under 28 U.S.C. § 1406(a)[3] when venue is not proper so the risk of forum shopping is greater because improper venue results in dismissal or transfer without the interests of all involved being necessarily weighed. If the law of the transferor court were applied, a plaintiff could deliberately file in a jurisdiction with favorable law but clearly improper venue and benefit from its choice. *LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n*, 830 F. 2d 522, 526 (4th Cir. 1987); *Nelson v. International Paint Co*, 716 F.2d 640, 643 (9th Cir. 1983); *Martin v. Stokes*, 623 F.2d 469, 472 (6th Cir. 1980). A § 1406(a) transfer calls for application of the law of the transferee court however which in this case is the law of South Dakota. *See, e.g., Schaeffer v. Village of Ossining*, 58 F.3d 48,

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(Cont'd)

> interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The historical and statutory notes associated with this section indicate that "[s]ubsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though venue is proper."

3. 28 U. S.C. § 1406(a) reads:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

50 (2d Cir. 1995) (quoting 15 Charles A. Wright et al., *Federal Practice and Procedure* § 3827, at 267 (2d ed. 1986); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1141-42 (5th Cir. 1992).

In this case neither the signed stipulation nor the district court order indicates which type of transfer was contemplated nor specifies which state law controls. If venue was not proper in Wisconsin, dismissal or a § 1406(a) transfer would have been required, and South Dakota law would apply on transfer. The relevant statutory requirements for venue are:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.
>
> . . . .
>
> (c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. . . .

28 U.S.C. § 1391 (1995).

There is no dispute here about § 1391(a)(1) or (3). Neither defendant resides in Wisconsin or was subject to personal jurisdiction there (and even if they were, the action could have been brought in South Dakota). Wisland claims that venue was proper under (a)(2), however, because a substantial part of the events giving rise to her damage claims occurred in Wisconsin where she received the majority of her medical treatment. She cites no authority for this proposition, and the events giving rise to her action involve the alleged negligence of the defendants in South Dakota, not the nature of her medical treatment in Wisconsin. *See, e.g., Smith v. Fortenberry,* 903 F.Supp. 1018, 1020 (E.D. La. 1995). Venue therefore did not lie in Wisconsin so the transfer had to have been under 28 U.S.C. § 1406(a), and the law of the transferee court should be applied.

Under South Dakota law Wisland's claim is time barred. To initiate her action in South Dakota before the statute of limitations ran, Wisland was required either to serve defendants or deliver copies of her summons and complaint to the proper county officials within three years. S.D. Codified Laws §§ 15-2-14(3), 15-2-30, 15-2-31; *see also Fischer v. Iowa Mold Tooling Co.*, 690 F.2d 155, 156 (8th Cir. 1982). The accident occurred on August 5, 1991, but she did not deliver the summons and complaint to officials in Pennington County until August 9, 1994, and she did not obtain service on the defendants until August 10, 1994. Wisland maintains nevertheless that her claim is timely because she posted her summons and complaint in the mail to the constables in Pennington County before the limitations period ran. Under South Dakota law, however, the summons and complaint must be delivered into the hands of the sheriff or other county official before the statute runs, not simply placed in the mail. *See Meisel v. Piggly Wiggly Corp.*, 418 N.W.2d 321, 323 (S.D. 1988); *Fischer,* 690 F.2d at 156.

Wisland also argues that Admiral waived the jurisdiction and venue claims related to its statute of limitations defense because it did not raise these issues in a timely fashion. The waiver case Wisland cites to support her argument is distinguishable because it involved a party who raised an affirmative defense in its pleadings, but failed to pursue it at summary judgment or at trial and then attempted to assert it anew on appeal. *See Violette v. Smith & Nephew Dyonics, Inc.*, 62 F.3d 8 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1568 (1996). In contrast, Admiral raised the defenses of venue and jurisdiction in its Wisconsin pleadings and relied on improper venue in Wisconsin as part of its theory for summary judgment. Admiral did not waive these issues.

Wisland also asserts Admiral waived its ability to argue the Wisconsin venue or jurisdiction issues because it did not raise them as independent defenses in its amended answer. *See* F. R. Civ. P. 12(h) (governing waiver of defenses); F. R. Civ. P.15(c) (governing relation back of amended pleadings). Admiral's venue and jurisdiction arguments, however, are a part of its statute of limitations theory for summary judgment, not independent defenses or reasons to dismiss. Admiral raised the statute of limitations defense in its amended pleadings which was sufficient to put Wisland on notice that related issues concerning choice of state law, jurisdiction, and venue might be involved.[4] The rules do not require a party to plead every step of legal reasoning that may be raised in support of its affirmative defense; they only require a defendant to state in short and plain terms its defenses to a plaintiffs claims. *See* F. R. Civ. P. 8(c). The district court allowed Admiral to plead the

4. The phrasing of Admiral's amended answer in fact suggested that an inquiry into choice of law issues would be required. It alleged that Wisland's claim was barred by the "applicable statute of limitations" leaving open which statute of limitations was meant.

South Dakota statute of limitations as an affirmative defense, and Admiral therefore had the right to raise the preliminary choice of law arguments necessary to present that defense. *See* F. R. Civ. P. 8(f).

In addition Wisland argues that Admiral should not have been allowed to amend its answer to include the defense of the statute of limitations after the district court's original scheduling deadline for amendments had passed. The rules give wide authority and discretion to the district court to manage its caseload. *See, e.g., United States v. Charles George Trucking Inc.*, 34 F.3d 1081, 1090 (1st Cir. 1994) (district court has considerable discretion in case management and may modify previous Rule 16 orders at its pleasure); *see also, Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1543 (10th Cir. 1996) (decision to modify Rule 16 order reviewed under abuse of discretion standard); *Huval v. Offshore Pipelines, Inc.*, 86 F.3d 454, 458 (5th Cir. 1996) (same); *Rapco, Inc. v. Commissioner*, 85 F.3d 950, 953 (2d Cir. 1996) (same); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 844 (11th Cir. 1991) (same). Admiral explained that it did not raise the limitations defense earlier because the original returns of service were in the possession of Wisland's attorney and were not filed with the district court in a timely fashion. Given the procedural posture of this case, the relevance of South Dakota's method of service may not have been immediately apparent at the outset of the litigation. Considering the record as a whole, the district court did not abuse its discretion by allowing Admiral to amend its pleadings to include a meritorious affirmative defense.[5]

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5. The district court's informal comments at the hearing about whether there had been excusable neglect for the delay in seeking the amendment do not translate into an abuse of discretion in later allowing Admiral to amend its answer. *See, e.g., O'Neill v. Agwi Lines*, 74 F.3d 93

(Cont'd)

Finally, Wisland argues the district court erred by denying her motion for reconsideration under F. R. Civ. P. 60. Wisland's motion simply repeated the arguments discussed above, and no abuse of discretion has been shown.

For these reasons, the judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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(Cont'd)
95 (5th Cir. 1996) (oral statements which conflict with court's formal findings and conclusions should be disregarded).

## APPENDIX B — SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION FILED OCTOBER 3, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV94-4219

RHONDA WISLAND,

Plaintiff,

vs.

ADMIRAL BEVERAGE CORP., and PAUL JAMES MAYER, IV,

Defendants.

SUMMARY JUDGMENT FOR DEFENDANT

The above-entitled matter having come on before the Court on briefs and oral arguments and the Court having entered its Memorandum Opinion and Order, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants Motion For Summary Judgment, be and the same is hereby granted; and, it is further

ORDERED, ADJUDGED AND DECREED that judgment is entered for the defendants on plaintiffs complaint and plaintiff's complaint is hereby dismissed with prejudice; and, it is further

*Appendix B*

ORDERED, ADJUDGED AND DECREED that defendants shall recover its taxable costs in the amount of $ _____, such costs to be hereinafter taxed and inserted herein by the Clerk.

Dated this 3rd day of October, 1996.

s/ Joseph Haas
Joseph Haas, Clerk

## APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION FILED SEPTEMBER 24, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV 94-4219

RHONDA WISLAND,

Plaintiff,

-vs-

ADMIRAL BEVERAGE CORP., and PAUL JAMES MAYER, IV,

Defendants.

MEMORANDUM OPINION
AND ORDER

APPEARANCES:

For the Plaintiff

Mr. Joseph A. Bradley
Attorney at Law
2228 W. Wells Street
Milwaukee, WI 53233

Mr. David J. King
Attorney at Law
505 W. 9th Street
Sioux Falls, SD 57104

*Appendix C*

For the Defendants

Mr. Michael J. Schaffer &
Ms. Lori Purcell Fossen
Attorneys at Law
P.O. Box 1030
Sioux Falls, SD 57101-1030

Motion for Summary Judgment, Doc. 21, by defendants Admiral Beverage Corporation and Paul James Mayer, IV, and plaintiff Rhonda Wisland's Motion to Certify an Amended Order For an Interlocutory Appeal, Doc. 54, are presently before the Court. In their summary judgment motion, the defendants claim that Ms. Wisland's claim is time barred by the South Dakota statute of limitations. Plaintiff has moved this Court for an order to certify an amended order for an interlocutory appeal of this Court's grant of the Defendants' Motion to Amend Pleadings, Doc. 48. Oral argument was heard on the motions on September 23, 1996. For the reasons set forth below, defendants' motion is granted and the complaint dismissed. Consequently, plaintiff's motion is rendered moot, and is therefore denied.

## BACKGROUND

This action arises out of an automobile accident in which the plaintiff, Rhonda Wisland, a Wisconsin resident, sustained personal injury. The accident occurred in South Dakota on August 5, 1991. Plaintiff originally filed her complaint in the United States District Court for the Western District of Wisconsin on August 4, 1994. She mailed copies of the summons and complaint to constables in Pennington County, South Dakota on August 5, 1994. Those copies were received in hand by the constables on August 9, 1994. Admiral Beverage and Mayer were not served until August 10, 1994.

*Appendix C*

In their initial motions and answer, Doc. 4, defendants moved to dismiss plaintiff's complaint on the grounds that the Wisconsin district court lacked personal jurisdiction over the defendants and that the Wisconsin district court was not the proper venue for this action. Defendants' motions were never addressed by the Wisconsin district court. On September 29, 1994, the Wisconsin district court transferred the case to this Court pursuant to a stipulation signed by all the parties, Doc. 5. The Wisconsin district court did not specify any statutory basis for the transfer. The stipulation provided that the parties "do not waive any defenses or claims which may be asserted in the United States District Court for the District of South Dakota." Stipulation and Order to Transfer Venue, Doc. 5.

On March 26, 1996, defendants filed their motion for summary judgment asserting that plaintiff's claim was commenced after South Dakota's statute of limitations had run. With leave of this Court, defendants filed their amended answer, Doc. 53, on June 21, 1996. The amended answer included the affirmative defense of statute of limitations.

**DISCUSSION**

The defendants have moved for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Court must view the facts in the light most favorable to the non-moving party.

In a diversity action, state law determines when an action is commenced in order to toll the statute of limitations. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Fischer v. Iowa Mold Tooling Co.*, 690 F.2d 155 (8th Cir. 1982); *Schebo v. Laderer,*

720 F. Supp. 146, 147 (D.S.D. 1989), *aff'd*, 902 F.2d 1576 (8th Cir. 1990). Both South Dakota and Wisconsin have three year statutes of limitation for personal injury accidents. SDCL 15-2-14(3) and Wis. Stat. Ann. § 893.54 (West 1996).

Under South Dakota law, an action is not commenced for statute of limitations purposes until the summons is served on the defendants. SDCL 15-2-30. South Dakota law, however, further provides:

> An attempt to commence an action is deemed equivalent to the commencement thereof when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them, usually or last resided; or if a corporation be a defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. Such an attempt must be followed by the first publication of the summons, or service thereof, within sixty days.

SDCL 15-2-31.

Under Wisconsin law, an action is commenced by filing a summons and complaint with the court and then serving the defendants within sixty days. Wis. Stat. Ann. § 801.02 (West 1996).

Defendants contend that Wisland's action is time barred because they were not served within the applicable statute of

limitation under South Dakota law. Wisland counters that Wisconsin law applies and that this action is not time barred because the complaint was filed before the statute of limitations had expired, and the defendants were served within 60 days. Alternatively, Wisland contends that even if South Dakota law governs, she is entitled to the benefit of the sixty-day extension because she mailed the summons to the Pennington County constables before the statute of limitations expired, even though the summons were not received by the constables until after the statute of limitations expired.

Therefore, the threshold issue is which law governs — South Dakota or Wisconsin. Once that issue is resolved, and if South Dakota law is found to govern, the Court must then consider the secondary issue of whether Wisland is entitled to a sixty-day extension under SDCL 15-2-31.

The issue of which law applies in the present case is complicated by the fact that this action was originally filed in the Wisconsin district court, and then transferred here. The determination of which law applies in a transferred action depends on the statutory basis for the transfer.

**Section 1404 or 1406 Transfer**

28 U.S.C. § 1404(a) provides for a change of venue for "the convenience of parties and witnesses, in the interest of justice."[1] 28 U.S.C. § 1406(a), on the other hand, provides for

1. 28 U.S.C. § 1404(a) provides in its entirety:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district court or division where it might have been brought.

the dismissal, or transfer to a district "in which it could have been brought" of a case which is filed in the wrong venue.[2]

Because neither the stipulation signed by all the parties nor the order of transfer by the Wisconsin District Court indicates under which change of venue provision the transfer to this Court was made, this Court must make the determination of whether the Wisconsin District Court had proper venue and jurisdiction. *See Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 52 (N.D.N.Y. 1988), *aff'd*, 871 F.2d 9 (2nd Cir. 1989); *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1086 (S.D.N.Y. 1984). If this Court determines that venue and jurisdiction were not proper in the Wisconsin district court, the law of this Court — the transferee court — will then apply. *Id.*

28 U.S.C. § 1391 is the general venue statute for federal district courts. The relevant provisions for this case are as follows:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the

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2. 28 U.S.C. § 1406(a) provides in its entirety:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

> action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.
>
> * * * *
>
> (c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. . . .

28 U.S.C. § 1391 (West 1996).

Plaintiff cannot establish that venue was proper in the Wisconsin district court. Applying § 1391(a) it is clear that: (1) no defendants reside in Wisconsin; (2) the accident occurred in South Dakota — no events or omissions giving rise to plaintiff's claim occurred in Wisconsin; (3) neither defendant was subject to personal jurisdiction in Wisconsin, and even if one were, there was a district in which the action may otherwise have been brought — the district of South Dakota.

The Court finds that venue was improper in the Western District of Wisconsin. Accordingly, transfer of plaintiff's action was required under 28 U.S.C. § 1406(a). *LaVay v. Dominion Fed. Sav. Ass'n*, 830 F.2d 522, 526 (4th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988). Following a section 1406(a) transfer, " 'the transferee court should apply whatever law it would have applied had the action been properly commenced there.' " *Schaeffer v. Village of Ossining*, 58 F.3d 48, 50 (2nd Cir. 1995)

(quoting 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3827, at 267 (2d ed. 1986)); *see e.g., Tel-Phonic Servs. v. TBS Int'l*, 975 F.2d 1134, 1141-42 (5th Cir. 1992) (applying law of the state in which transferee court sits following section 1406(a) transfer); *LaVay Corp. v. Dominion Fed. Sav. Loan Ass'n*, 830 F.2d at 526 (same); *Martin v. Stokes*, 623 F.2d 469, 472 (6th Cir. 1980); *cf. Levy v. Pyramid Co. of Ithaca*, 871 F.2d at 10 (applying law of the state in which transferee court sits following transfer to cure defect of personal jurisdiction).

The parties' stipulation to a change of venue to South Dakota district court does not alter this Court's analysis. *LaVay Corp. v. Dominion Fed Sav. & Loan Ass'n*, 830 F.2d at 526. If venue was improper in Wisconsin district court, then § 1404(a) is not the appropriate vehicle for transfer. *Naegler v. Nissan Motor Co.*, 835 F. Supp. 1152, 1157 (W.D. Mo. 1993). The rationale for applying the law of the transferror court is clear. As the court stated in *LaVay*, "[a]bsent such a rule, plaintiffs could benefit from bringing an action in an impermissible forum, thereby encouraging filing of actions in states with substantive rules that favor the plaintiff." 830 F.2d at 526 (citing *Martin v. Stokes*, 623 F.2d at 472). Therefore, this Court must apply South Dakota law to this action.

**Plaintiff's Claim Commenced Outside South Dakota's Statute of Limitation**

Plaintiff's cause of action is time barred under the applicable statute of limitation because, according to SDCL 15-2-31, the action commenced more than three years after August 5, 1991. *See Fischer v. Iowa Mold Tooling Co.*, 690 F.2d at 156. Here, although the summons and complaint were timely filed in

*Appendix C*

Wisconsin district court on August 4, 1994, copies of the summons and complaint were not delivered to constables in Pennington County, South Dakota until August 9, 1994 — four days after the statute of limitations expired. Furthermore, the defendants were not served until August 10, five days after the expiration of the statute of limitations.

Plaintiff also argued in the alternative that she is entitled to the 60 day extension under SDCL 15-2-31 because she posted copies of the summons and complaint in the mail to the constables in Pennington County on August 5, 1994. That is simply not the law in South Dakota. In order to receive the benefit of the sixty-day extension under SDCL 15-2-31, the summons must be delivered to the sheriff or other officer of the county before the statute of limitations runs. *Meisel v. Piggly Wiggly Corp.*, 418 N.W.2d 321 (S.D. 1988). Posting the summons in the mail within the three-year statutory period is insufficient. The summons must be placed in the sheriff's hands within the period of the statute in order for the sixty-day extension period to apply. *Fischer v. Iowa Mold Tooling Co.*, 690 F.2d at 156 (citing *Arbach v. Gruba*, 199 N.W.2d 697 (1972)). Because plaintiff failed to deliver the summons into the hands of the Pennington County constables until after the statute ran, summary judgment for the defendants is appropriate.

Ms. Wisland finally argues that her complaint was timely filed under Rule 3 of the Federal Rules of Civil Procedure, which provides that a civil action "is commenced by filing a complaint with the court." She contends that compliance with Rule 3 constitutes "commencement of an action" sufficient to toll the South Dakota statute of limitations. The Supreme Courts unanimous decision in *Walker v. Armco Steel* made clear that compliance with Rule 3 neither tolls nor displaces state tolling

rules for purposes of state statutes of limitations. 446 U.S. at 750-51; *see Fischer v. Iowa Mold Tooling Co.*, 690 F.2d at 157 (holding that compliance with Rule 3 does not toll South Dakota's statute of limitations in a diversity case arising under South Dakota law).

Therefore, upon the record herein,

IT IS ORDERED:

(1) That defendants' Motion for Summary Judgment, Doc. 21, is granted.

(2) That plaintiff's Motion To Certify An Amended Order For An Interlocutory Appeal, Doc. 54, is rendered moot and denied.

(3) That the Clerk of Courts shall enter a Judgment consistent herewith.

Dated this 24th day of September, 1996.

BY THE COURT:

s/ John B. Jones
Senior U.S. District Judge

ATTEST:

JOSEPH HAAS, CLERK

BY: s/ Delores Martin
DEPUTY

(SEAL)

## APPENDIX D — SECOND AMENDED RULE 16 SCHEDULING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION FILED APRIL 12, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV 94-4219

RHONDA WISLAND,

Plaintiff,

-vs-

ADMIRAL BEVERAGE CORP., and PAUL JAMES MAYER, IV,

Defendants.

SECOND AMENDED
RULE 16 SCHEDULING ORDER

That the parties have stipulated to an extension of the Rule 16 deadlines, and good cause appearing therefor,

Now, therefore,

IT IS ORDERED:

(1) That all discovery will be commenced in time to be completed by March 5, 1996; and that a maximum of forty (40) interrogatories by each party to any other party will be allowed, and responses thereto shall be due thirty (30) days after service.

(2) That reports from retained experts under Rule 26(a)(2) shall be due from plaintiffs by November 30, 1995 and from defendants by January 2, 1996; and supplementations thereto under Rule 26(e) shall be due thirty (30) days prior to trial.

(3) That all motions, other than motions in limine, together with supporting briefs, shall be filed and served on or before March 30, 1996; that opposing parties shall file and serve answering materials and briefs on or before April 15, 1996, and reply briefs, if desired, may be filed and served on or before April 26, 1996.

(4) That all motions shall be heard and a pretrial conference shall be held on Monday, June 3, 1996 at 11:00 A.M., and a trial date shall be fixed by the Court after consultation with counsel of record.

(5) That the dates set out herein may be modified by the Court for good cause shown.

Dated this 12th day of April, 1996.

BY THE COURT:

s/ John B. Jones
Senior U.S. District Judge

ATTEST:

JOSEPH HAAS, CLERK

BY: s/ D. Swenson

DEPUTY

(SEAL)

## APPENDIX E — STIPULATION AND AMENDED RULE 16 SCHEDULING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION FILED OCTOBER 3, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 94-4219

RHONDA R. WISLAND,

Plaintiff,

vs.

ADMIRAL BEVERAGE CORP. and PAUL JAMES MAYER, IV,

Defendants.

STIPULATION AND ORDER TO
EXTEND DISCOVERY DEADLINES

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STIPULATION

IT IS HEREBY stipulated and agreed to, between the attorneys representing the parties to the above-styled matter, that plaintiff shall have until November 30, 1995 in which to name expert witnesses and file their reports. It is further stipulated and agreed that all remaining discovery deadlines be extended a like length of time, i.e., sixty-two (62) days.

*Appendix E*

Date: September 25, 1995

EISENERG, WEIGEL, CARLSON,
BLAU, REITZ & CLEMENS, S.C.

By: s/ Joseph A. Bradley
Joseph A. Bradley
Attorney for Plaintiff

Date: September 29, 1995

DAVENPORT, EVANS, HURWITZ &
SMITH, LAWYERS

By: s/ Lori Purcell Fossen
Lori Purcell Fossen
Attorney for the Defendants

*Appendix E*

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV 94-4219

RHONDA WISLAND,

Plaintiff,

-vs-

ADMIRAL BEVERAGE CORP., and PAUL JAMES MAYER, IV,

Defendants.

AMENDED RULE 16 SCHEDULING ORDER

That the parties have stipulated to an extension of the Rule 16 deadlines, and good cause appearing therefor,

Now, therefore,

IT IS ORDERED:

(1) That all discovery will be commenced in time to be completed by March 5, 1996; and that a maximum of forty (40) interrogatories by each party to any other party will be allowed, and responses thereto shall be due thirty (30) days after service.

(2) That reports from retained experts under Rule 26(a)(2) shall be due from plaintiffs by November 30, 1995 and from

defendants by January 2, 1996; and supplementations thereto under Rule 26(e) shall be due thirty (30) days prior to trial.

(3) That all motions, other than motions in limine, together with supporting briefs, shall be filed and served on or before March 30, 1996; that opposing parties shall file and serve answering materials and briefs on or before April 15, 1996, and reply briefs, if desired, may be filed and served on or before April 26, 1996.

(4) That all motions shall be heard and a pretrial conference shall be held on Monday, May 13, 1996 at 11:00 A.M., and a trial date shall be fixed by the Court after consultation with counsel of record.

(5) That the dates set out herein may be modified by the Court for good cause shown.

Dated this 3rd day of October, 1995.

BY THE COURT:

s/ John B. Jones
Senior U.S. District Judge

ATTEST

WILLIAM F. CLAYTON, CLERK

BY: s/ Linda M. Ziegler
DEPUTY

(SEAL)

## APPENDIX F — RULE 16 SCHEDULING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION FILED FEBRUARY 3, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV 94-4219

RHONDA WISLAND,

Plaintiff,

-vs-

ADMIRAL BEVERAGE CORP., and PAUL JAMES MAYER, IV,

Defendants.

RULE 16 SCHEDULING ORDER

Counsel for the parties having held a planning meeting in compliance with F.R.C.P. 26(f), and submitted a report thereon,

Now, therefore,

IT IS ORDERED:

(1) That the Form 35 Joint Report and Scheduling Information, filed February 2, 1995 is hereby approved and adopted by the Court.

*Appendix F*

(2) That the parties shall have until August 1, 1995 to move to join additional parties and to move to amend the pleadings.

(3) That all discovery will be commenced in time to be completed by January 2, 1996; and that a maximum of forty (40) interrogatories by each party to any other party will be allowed, and responses thereto shall be due thirty (30) days after service.

(4) That reports from retained experts under Rule 26(a)(2) shall be due from plaintiffs by September 29, 1995 and from defendants by October 31, 1995; and supplementations thereto under Rule 26(e) shall be due thirty (30) days prior to trial.

(5) That all motions, other than motions in limine, together with supporting briefs, shall be filed and served on or before January 31, 1996; that opposing parties shall file and serve answering materials and briefs on or before February 22, 1996, and reply briefs, if desired, may be filed and served on or before March 4, 1996.

(6) That all motions shall be heard and a pretrial conference shall be held on Monday, April 8, 1996 at 11:00 A.M., and a trial date shall be fixed by the Court after consultation with counsel of record.

(7) That the dates set out herein may be modified by the Court for good cause shown.

Dated this 3rd day of February, 1995.

BY THE COURT:

s/ John B. Jones
U.S. District Judge

*Appendix F*

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: s/ Shelly Hink
DEPUTY

(SEAL)

## APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED SEPTEMBER 10, 1997

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 96-3916SDSF

Rhonda Wisland,

Appellant,

v.

Admiral Beverage Corp. and Paul James Mayer, IV,

Appellees.

Appeal from the United States District Court
for the District of South Dakota

The petition for rehearing filed by the appellant has been considered by the court and is denied.

September 10, 1997

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

## APPENDIX H — PETITION FOR REHEARING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION DATED JULY 28, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 94-4219

RHONDA R. WISLAND,

Plaintiff,

vs.

ADMIRAL BEVERAGE CORP. and PAUL JAMES MAYER, IV,

Defendants.

APPELLANT'S PETITION FOR REHEARING

NOW COMES the plaintiff/appellant, Rhonda Wisland, (hereinafter "Wisland") by her attorneys, Eisenberg, Weigel, Carlson, Blau, Reitz & Clemens, S.C. and petitions the UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT for a rehearing on the Court's decision in Case No. 96-CV-3916 filed July 16, 1997. Authority for Wisland's petition is grounded on Federal Rules of Appellate procedure, Rule 40, Eighth Circuit Rule 40A, and all the pleadings and papers filed and recorded herein, as well as the following issues Wisland feels the panel overlooked or misconstrued.

*Appendix H*

I. The Court, on appeal, misconstrued the record concerning whether or not the district court had extended the time to amend the Rule 16 scheduling order. On pages 2-3 of the Decision the following language in relevant part is found:

> In February 1995 Judge Jones entered a Rule 16 scheduling order establishing August 1, 1995 as the deadline for amendments to the pleadings and January August 1, 1995 as the deadline for amendments to the pleadings and January 1996 as the deadline for discovery and any additional motions. Judge Jones twice amended this order by *extending the deadlines for discovery and for certain* motions. (Emphasis added)

The record reflects that the district court specifically did not amend the Rule 16 Scheduling Order to extend the deadline to amend the pleadings, at any time during the proceedings in this matter. The original Rule 16 scheduling order provides, in paragraph 2:

> The parties shall have until August 1, 1995 to move to join additional parties and to move to amend the pleadings.

Paragraph 5 provides dates for other motions. The point is that defendants did not "move to amend pleadings" prior to August 1, 1995.

In September of 1995 the parties, by their attorneys stipulated to ". . . extend time to *name expert witnesses and file their reports* . . ." and further agreed that ". . . remaining *discovery deadlines* be extended . . ." See Exhibit #2. There was

no stipulation to extend time to amend pleadings. The district court then issued an amended scheduling order October 3, 1995. In that amended order the court addressed the stipulation specifically. The parties *did not* stipulate, or even discuss, amending the pleadings. Neither did the order extend time to amend pleadings. In fact, paragraph 3 of the amended order is identical to paragraph 5 of the original Rule 16 scheduling order except for the dates.

The district court issued a second amended Rule 16 scheduling order dated April 12, 1996. The second amended scheduling order again addresses the "stipulation" which referred to the only "stipulation" of the parties , i.e., to extend discovery. There was no stipulation between the parties at any time to extend time to amend the pleadings. Nor was there any "good cause" shown by defendants from which an inference could be drawn that defendants were guilty of "excusable neglect" and should be allowed to amend their pleadings. That showing of "excusable neglect" would have had to have been made at the hearing on the motion to amend June 3, 1996. None was made. Therefore, contrary to this Appellate Court's belief, the trial court never amended the scheduling order to extend defendants' time to amend its answer. Neither party, in their briefs, construed the trial courts' amended scheduling order as an extension of time to amend pleadings. Neither did the trial court because the court made an express finding of "no good cause" as to the amendment issue.

II. The Court, on appeal, also misconstrued the district court's statements, on record, made at the June 3, 1996 motion hearing. At footnote 5, page 8 of the opinion the Court construed Judge Jones comments, about whether there had been excusable neglect for delay in seeing to amend the complaint, as merely

"informal comments". Such a construction of Judge said. Quoting the judge directly, he said:

> And let me say in this case *it would be my express finding* that there has been no excusable neglect shown since the issue of when the pleadings were served on the defendants is something that counsel either knew or should have known early on, and the failure to ascertain it when it was served might be neglect, but it wouldn't be excusable neglect. (Emphasis added)

The court made an express finding, not a casual comment.

The district court failed to exercise the two step analysis, in allowing, the amendment of pleadings, as set forth in *Financial Holding Corp. v. Garnac Grain Company*, 177 F.R.D. 165 (N.D. Mo. 1989). The first step is to determine whether or not the scheduling order should be extended (which requires good cause), and only upon that finding can the scheduling order be amended to allow additional time to amend the pleadings. Only once the court has decided to amend the scheduling order can the court then take up the question of allowing the amendment of pleadings under Rule 15. Because the Appellate Court mistakenly assumed the trial court amended the scheduling order to allow amendment of pleadings, it did not deal with the necessity of reviewing the two-step process which, first of all, requires "good cause" before amendment of the scheduling order.

Wisland contends the Court on Appeal, focused on the statute of limitations issue unduly; and ignored the case law concerning whether the amendment, to include the statute of

limitations, should have been allowed. Wisland further contends, that the Court on appeal, should have specifically addressed the issue of the propriety of allowing the pleadings to be amended.

## CONCLUSION

Petitioner respectfully requests that the Petition For Rehearing be granted.

Dated at Milwaukee, Wisconsin, this 28th day of July 1997.

EISENBERG, WEIGEL, CARLSON,
BLAU, REITZ & CLEMENS, S.C.

s/ Joseph A. Bradley
By: Joseph A. Bradley
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s/ Joseph W. Weigel
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